IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO DEFENDANTS' JOINT MOTION *IN LIMINE* TO PROHIBIT PLAINTIFFS' [SIC] TESTIMONY REGARDING DATA ACQUIRED AND ANALYZED BEYOND EXPERT REPORTING DEADLINES [DKT #2400]

The State of Oklahoma ("the State") hereby submits this response in opposition to Defendants' Joint Motion *in Limine* To Prohibit Plaintiffs' [SIC] Testimony Regarding Data Acquired and Analyzed Beyond Expert Reporting Deadlines ("Defendants' Motion") [Dkt. #2400]. The Court should deny Defendants' Motion.

Introductory Statement

The water quality sampling conducted by the State in this case has been undertaken to address an historic, *and ongoing,* problem. Namely, that the waters of the IRW have been adversely affected by the land disposal of poultry waste historically and continue to be impacted by such disposal to this day. While Defendants may argue that the water quality sampling was undertaken only pursuant to this litigation that is simply not the case. The State identified the pollution problem in the IRW before the investigation and discovery began for this case and it will continue its investigation in the future. Thus, although Defendants wish to artificially constrain the State's work in the

IRW by the imposition of the schedule for this case, the fact remains that the scientific investigation began before this case and will continue after.

Background

The State's expert reports were originally due on December 3, 2007. DKT #1075. In October 2007, this Court granted the State an extension until April 2008 for submission of all expert reports save those related to damages. DKT #1376. In March of 2008, the deadline for submission of the State's expert reports was extended until May 2008. After production of its expert reports, the State continued (and is continuing) its water quality sampling in the IRW. Pursuant to two separate court orders the State has continued to supplement its production to Defendants of the sampling data and analysis it has undertaken in the IRW. *See* DKT #1016 (requiring sampling data, among other things, to be produced to Defendants upon receipt by the State); *see also* DKT #1710 (requiring the State to produce data, within ten (10) days its generation).

The data in question is water quality sampling data collected in Lake Tenkiller and IRW streams and rivers. The Court permitted Defendants to conduct a spring sampling campaign of their own in order to evaluate both high and low flow years and seasons. This sampling campaign extended to May 30, 2009, over one month beyond the discovery cutoff date of April 16, 2009, and a full year beyond the deadline for the State's expert reports. DKT #1756, p. 5. When the Court granted the extended sampling period and extension to Defendants, the State did not know what data Defendants would collect during the months subsequent to the State's expert report deadline. Nevertheless, the State continued to collect water quality data as part of its continuing sampling program in the IRW and for possible rebuttal to that collected by Defendants through

May 2009. The Defendants, in an effort to stifle rebuttal, are attempting to convince the Court to exclude criticisms of the Defendants' expert reports and opinions. Defendants have consistently and inaccurately construed any effort by the State or its experts to challenge the reports of their experts as supplemental changes to the State's expert opinions. They have further objected to any criticism based on the use of data collected by the State after May 2008, despite the fact that Defendants' own experts have used this data for their expert analysis and reports.

The data collected by the State after May 2008 merely offers a more *complete* record of the facts. *See, e.g.*, DKT #2400, at p. 5 (Highlighting the necessity under Rule 26(e) for data that offers a more correct or complete expert report). It is imperative that the Court be able to view the most up-to-date sampling data regarding the condition of the IRW and that *both sides* be allowed the opportunity to use the data, not just the Defendants.

Argument

A. The Data Produced to Defendants Is Admissible

It is unclear from Defendants' Motion whether they claim the sampling data at issue is irrelevant or unduly prejudicial. What is apparent about this data is that it satisfies both Rule 401 and Rule 403. Rule 401 states in pertinent part: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, all relevant evidence is admissible. *See* Fed. R. Evid. 402. Defendants have not claimed that this data does not make any fact in this litigation more or less probable. Further, this sampling data presents no undue prejudice

or delay. What is at issue is merely sampling data and the data is directly relevant to the issues in this case. For example, Defendants wrongly assert that water quality conditions in Lake Tenkiller are improving. The water quality data collected in Lake Tenkiller is clearly relevant to this issue. Defendants are relying on data collected by the State after May 2008 and allowing the State to use the data as well would not be prejudicial to Defendants. To the contrary, it would be severely prejudicial to the State to preclude the State from using the data while allowing Defendants and their experts to rely on it in this case.

B. Defendants intend to use 2008 Data at Trial

Once again Defendants have attempted to preclude the State from utilizing evidence they themselves have used in this case.[2] For instance, Dr. Connolly in his report refers to the State's 2008 data as the source for multiple data summary charts. *See* Exhibit 1 (Connolly Rpt., Fig. 8-1)(Defendants' Joint Exhibit DJX6162). Further, Defendants' expert Dr. Sullivan also relied on the State's 2008 sampling data in his report. *See* Exhibit 2 (Sullivan Rpt., Fig. 10-1). Defendants have "opened the door" to the use of the State's 2008 sampling data by using both their own 2008 data, as well as the State's.

This Court has previously defined rebuttal: "True rebuttal is that which is precisely directed to rebutting a new matter or new theories presented by the defendant's

[2] As the Court is aware, during the *Daubert* phase of this action, Defendants moved to exclude the declaration of Dr. Tamzen MacBeth. DKT #2241. That motion was initially granted; however, at hearing it was revealed that Defendants intended to use significant portions of Dr. MacBeth's deposition as evidence for *Daubert* purposes and had filed their motion to exclude Dr. MacBeth in an effort to stifle rebuttal. The Court recognized this and allowed certain portions of Dr. MacBeth's declaration to be admitted. DKT #2386.

case-in-chief." DKT #1989, p. 2 (citations omitted). The schedule of this litigation has allowed Defendants to conduct sampling after the reports were submitted by the State and even beyond the discovery cutoff. DKT #1985, at p. 3. The State should be allowed to utilize the sampling data at issue in this Motion for the purposes of rebutting Defendants expert testimony.

Defendants' experts have also admitted that *more data is better than less data* in cases of this type involving complicated scientific analysis and conclusions. Exhibit 3 (Connolly Depo. p. 344:8-21); Exhibit 4 (Horne Depo. p. 22:14-20). Clearly, allowing the State to utilize the sampling data in question will provide the Court with a more complete picture of current water quality conditions in the IRW.

C. Defendants Offer Only Speculation and Conjecture as To the Effect of the State's Data

Defendants' primary argument concerning the sampling data in question is that it is "surely an attempt to untimely bolster the opinions contained in their reports with testimony and exhibits at trial." DKT #2400, at p. 7. This is simply not true, and Defendants ask the Court to exclude this evidence with no explanation as to ***why*** the data itself is designed to bolster any expert opinion. Defendants merely attach a chart showing the types of data produced by the state without offering even one example of a piece of data contained in the productions that is, in fact, bolstering as opposed simply data produced in compliance with the Court's orders to produce all sampling data.

Defendants complain of some of the sampling data was used during the depositions of several of their experts; however, in those cases it is clear that the evidence

was true rebuttal and not meant to bolster any of the State's expert's opinions.[3] The fact that the data was used in depositions of some of Defendants' experts is irrelevant to the instant Motion. Defendants present no analysis of the data and do not explain why it should be excluded or even how it bolsters any of the State's expert's opinions. Thus, the sampling data should not be excluded and, if Defendants object to the use of any particular data at trial, their objections can be heard by the Court at that time so that the objection can be resolved with respect to the particular evidence being offered and the context in which it is being offered.

D. Data Utilized in Depositions Was True Rebuttal and Proper Cross Examination

Defendants assert that it was improper for the State to utilize updated sampling data and rebuttal analysis in depositions of Defendants' experts. These arguments are simply not relevant to whether Defendants' Motion to preclude the State from using the data at trial for rebuttal purposes should be granted. Further, Defendants offer no analysis showing any of the sampling data was used for anything other than cross-

[3] In an effort to make clearer what is contained in the data productions in question the State would submit the following: DKT #2400, Ex. A is from June 6, 2008 and contains primarily, PCR data from Northwind, which would have been included in Dr. Harwood's considered materials; DKT #2400, Ex. B is from June 10, 2008 and contains primarily L&L data that would have been part of Dr. Olsen's considered materials (note these data were preliminary and would have been produced separately again after QA/QC review); some other of the data (e.g. the GEL reports from 2005) would have also appeared in Dr. Olsen's considered materials. Generally, the rest of the transmittals contain lab reports, QA/QC evaluations, field notebooks and photos associated with the following programs: A bucket viewing program which took place between May 27 and June 13, 2008; four separate sampling events at Lake Tenkiller taking place June 3, July 9, September 22, and October 14, 2008; sampling events conducted at Locust Grove on September 4, October 8 and November 11, 2008; Sampling conducted at the Fite property on November 10 and 19, 2008. Aside from these sampling programs, there are many lab reports and data analyses from both the United States Geological Survey (USGS) and the Oklahoma Scenic Rivers Commission (OSRC) that appear throughout the date range of the productions.

examination during any deposition. Federal courts including the Tenth Circuit have allowed counsel, during cross-examination, to ask an expert witness, "to make certain computations based upon assumptions not included in his hypothesis. . . ." *Taylor v. REO Motors, Inc.*, 275 F.2d 699, 702 (10th Cir. 1960). The Tenth Circuit in *Taylor* further reasoned:

> [O]n cross examination of an expert witness, any fact germane to the inquiry, whether testified to or not, may, in the sound discretion of the court, be used for testing the expert. . . . The cross examiner is not limited to his adversary's hypotheses. He may also hypothesize for the purpose of testing the skill, learning or accuracy of the expert, or to test the reasonableness of his opinion, provided of course that the hypothesis is founded in fact and is germane to the inquiry. . . . The computations which the expert witness was asked to make were based upon factual assumptions. They were relevant to the inquiry and certainly not reversibly erroneous.

Id. (citations and internal quotations omitted).

Defendants take issue with the State's use of the new sampling data and figures at their expert's depositions. However, this data was used merely to cross-examine Defendants' experts. For instance, at defense expert Dr. Alex Horne's (Dr. Horne) deposition, he discussed his data and finding from Lake Tenkiller sampling occurring in 2008. DKT #1985, pp. 3-5, Ex. A (Horne Depo., p. 25:5-12). Despite Dr. Horne's discussion of his 2008 sampling and data, Defendants maintain that the State should not be able to rebut his opinions or cross-examine him, or any defense expert who sampled in 2008, with the State's own data from Lake Tenkiller in 2008.

Defendants also object to the use of an aerial photo during the deposition of Dr. Glenn Johnson (Dr. Johnson). This aerial photo was not part of the water quality sampling data collected by the State after May 2008 and did not contain any new data. Thus, it is irrelevant to the issues raised in this Motion. Additionally, the photo was

merely used to cross-examine Dr. Johnson regarding his opinions on the location of poultry houses in the IRW. *See* Dkt. #1972-5 at 10.

It is important to note that Defendants do not attach any of the pieces of evidence they object to and want excluded. *See generally* DKT #2400 (none of the exhibits attached contain any substantive data or exhibits used at deposition). Defendants' sweeping generalizations regarding this material provide the Court no basis on which to rule that this sampling data is irrelevant, prejudicial or otherwise inadmissible.

E. The Cases Cited by Defendants Are Distinguishable from This Case

The cases cited by Defendants are readily distinguishable from the instant case. In *Cohlmia v. Ardent Health Service, LLC*, the expert whose supplementation was invalid filed an initial report under Rule 26 that offered no analysis or explanation on which to rest his opinions. 254 F.R.D. 426, 434 (N.D. Okla. 2008). In an effort to cure the fatal defects in his report the expert in *Cohlmia* supplemented his opinions with analysis. *Id.* at p. 433. The Court in *Cohlmia* held this supplementation was inadmissible because, "[a] party cannot offer a mere litany of opinions, devoid of rationale, and contend that the report will be "supplemented" later with the basis and reasons." *Id. Cohlmia* is unlike the case at hand. None of the State's experts in this case submitted a report without a scientific basis. Indeed, the data at issue is not supplementation of opinion; it is data. The data simply provides the Court with the most current information regarding water quality conditions in the IRW.

Likewise, in *Palmer v. Asarco*, the facts are starkly different from this case. In *Palmer* the expert whose supplementation was excluded was asked by the plaintiffs in that case to create new opinions as to issues previously unaddressed in his original report

after the expert reporting deadline. *See* 2007 WL 2254343, at. *3-5 (N.D. Okla. Aug. 3, 2007). The Court in *Palmer* noted: "Plaintiffs can not reasonably claim that Dr. Brown's new affidavit is a supplement simply because plaintiffs asked him to expand the scope of his expert testimony." *Id.* at *4. The sampling data produced to Defendants is unlike the supplemental report filed in *Palmer*. The State has not submitted supplemental reports based on the sampling data collected after May 2008 and will only utilize the data for true rebuttal or cross-examination. The sampling data at issue had no effect on the experts' opinions in this case.

Lastly, Defendants cite *Cook v. Rockwell Intern Corp.*, claiming the two cases are analogous; however, *Cook* is readily distinguishable from the case at hand. In *Cook*, the expert whose supplemental report was excluded admitted that his initial Rule 26 report was merely "the starting point" for his later opinions. 580 F. Supp. 2d 1071, 1168 (D. Colo. 2006). That is not the case here as the State is not seeking to supplement its expert reports and those reports cannot be characterized as the "starting point" for the experts report. The State produced the sampling data in compliance with the Court's orders and it was not produced prior to May 2008 because it was collected after that time. Simply put, data for the last half of 2008 and the first months of 2009 was not available in May 2008 when the State's expert reports were submitted.

Conclusion

The sampling data produced after May 2008 is relevant in all respects, probative and not prejudicial and was produced to Defendants according to the Court's orders. Defendants have not provided the Court with any explanation as to how the sampling data produced to them is bolstering in nature. Defendants' experts have used *this same*

data from months subsequent to the State's expert reporting deadlines and, in some cases, beyond the discovery cutoff to their own benefit. The State should not be precluded from utilizing data that the Defendants are allowed to use at trial and should be allowed to cross-examine and rebut the opinions of Defendants's experts with this data.

Respectfully Submitted,

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